RECORD AND BRIEF

No. 11 347

Supreme Court, U.S.
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In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since passage of the Clean Water Act, the Environmental Protection Agency has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System ("NPDES") and thus not to require a permit as a point source discharge of pollutants. Under a rule first promulgated in 1976, EPA consistently has defined as *non*point source activities forest road construction and maintenance from which natural runoff results. And in regulating stormwater discharges under 1987 amendments to the Act, EPA again expressly excluded runoff from forest roads. In consequence, forest road runoff long has been regulated as a nonpoint source using best management practices, like those imposed by the State of Oregon on the roads at issue here. EPA's consistent interpretation of more than 35 years has survived proposed regulatory revision and legal challenge, and repeatedly has been endorsed by the United States in briefs and agency publications.

The Ninth Circuit—in conflict with other circuits, contrary to the position of the United States as amicus, and with no deference to EPA—rejected EPA's longstanding interpretation. Instead, it directed EPA to regulate channeled forest road runoff under a statutory category of stormwater discharges "associated with industrial activity," for which a permit is required. The question presented is:

Whether the Ninth Circuit should have deferred to EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial stormwater subject to NPDES.

RULES 14.1 AND 29.6 STATEMENT

Defendants-appellees below and petitioners here are Georgia-Pacific West LLC, Hampton Tree Farms, Inc., Stimson Lumber Company, and Swanson Group, Inc. Intervenor defendants-appellees below and petitioners here are American Forest and Paper Association, Oregon Forest Industries Council, and Tillamook County, Oregon.

Additional defendants-appellees below were Marvin Brown, Oregon State Forester, in his official capacity, and Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, Chris Heffernan, William Hutchison, and Jennifer Phillippi, members of the Oregon Board of Forestry, in their official capacities. The State defendants-appellees are filing a separate certiorari petition.

Petitioner Georgia-Pacific West LLC (formerly Georgia-Pacific West, Inc.) is a privately held Oregon limited liability company, the sole member of which is Georgia-Pacific LLC, a privately held Delaware limited liability company. The ultimate, indirect parent of Georgia-Pacific LLC is Koch Industries, Inc. No publicly held company owns 10 percent or more of the membership interests or stock of Georgia-Pacific LLC or Koch Industries, Inc., respectively.

Petitioner Hampton Tree Farms, Inc. is a family owned corporation, the parent of which is Hampton Resources, Inc., a family held Oregon corporation. No publicly held company owns 10 percent or more of the stock of Hampton Resources, Inc.

Petitioner Stimson Lumber Company is a family owned corporation organized under the laws of Oregon. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

Petitioner Swanson Group, Inc. is a family owned corporation organized under the laws of Oregon. No publicly held company owns 10 percent or more of its stock.

Petitioner American Forest and Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. No parent corporation or publicly held company has a 10 percent or greater ownership interest in AF&PA.

Petitioner Oregon Forest Industries Council is a mutual benefit corporation organized under the laws of Oregon and Section 501(c)(6) of the Internal Revenue Code. It has no parent corporation and no publicly held company owns a 10 percent or greater interest in OFIC.

Petitioner Tillamook County is a governmental unit of the State of Oregon, with a population of approximately 25,000 persons. Some 44 percent of the land within the County's borders is State-owned, most as part of Tillamook State Forest, and 93 percent of the County is classified as forest land.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULES 14.1 AND 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The Federal Statutory Context. 5

B. EPA's Silvicultural Rule 6

C. Stormwater Regulation Under The 1987 Amendments To The Clean Water Act. 10

D. Oregon's Regulation Of Runoff From Forest Roads. 12

E. The District Court's Decision Dismissing Plaintiff's Suit. 13

F. The Ninth Circuit's Decision Ordering EPA To Regulate Forest Road Runoff As An Industrial Stormwater Discharge. 14

REASONS FOR GRANTING THE PETITION 15

I. IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, THE NINTH CIRCUIT FAILED TO DEFER TO EPA'S INTERPRETATION OF THE CLEAN WATER ACT. 16

A. This Court's Precedents Require Deference To EPA's Silvicultural And Stormwater Rules. 16

B. The Ninth Circuit's Ruling Conflicts With Decisions Of Other Circuits. 25

TABLE OF CONTENTS—continued

Page

C. The Ninth Circuit's Errors On The Merits Led It To Err In Finding Subject Matter Jurisdiction.....29

II. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE AND IS RIPE FOR THIS COURT'S REVIEW. 30

CONCLUSION 35

APPENDIX

Opinion for the U.S. Court of Appeals for the Ninth Circuit and Order Denying Rehearing and Rehearing En Banc (May 17, 2011) 1a

Opinion for the District Court for the District of Oregon (Mar. 1, 2007).....48a

Pertinent Statutes and Regulations.....69a

EPA's Statement of Non-Opposition And Memorandum in Support of PALCO's Motion to Dismiss, *Environmental Protection Information Center* v. *Pacific Lumber Co.*, No. C 01-2821 (N.D. Cal. filed Nov. 17, 2003).....81a

United States' Amicus Brief, *Northwest Environmental Defense Center* v. *Brown*, No. 3:06 CV 01270 (D. Or. filed Dec. 6, 2006) 93a

TABLE OF AUTHORITIES

Page(s)

CASES

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992)..... 5

Association to Protect Hammersley, Eld & Totten Inlets v. *Taylor Resources, Inc.*, 299 F.3d 1007 (9th Cir. 2002)..... 28

Auer v. *Robbins*, 519 U.S. 452 (1997).....*passim*

Catskill Mountains Chapter of Trout Unlimited, Inc. v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003)..... 33

CFTC v. *Schor*, 478 U.S. 833 (1986)..... 24

Chase Bank USA v. *McCoy*, 131 S. Ct. 871 (2011)..... 23

Chemical Mfrs. Ass'n v. *Nat. Res. Def. Council*, 470 U.S. 116 (1985)..... 19

Chevron U.S.A., Inc. v. *Natural Res. Def. Council*, 467 U.S. 837 (1984)..... 16, 24

Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009)..... 16, 24

Conservation Law Foundation v. *Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), aff'd, 139 F. App'x 3381 (2d Cir. 2005)..... 26, 27

TABLE OF AUTHORITIES—continued

Page(s)

Environmental Defense Center v. *EPA*, 344 F.3d 832 (9th Cir. 2003) 11, 14, 28

Fishermen Against the Destruction of the Environment v. *Closter Farms*, 300 F.3d 1294 (11th Cir.2002) 27

League of Wilderness Defenders v. *Forsgren*, 309 F.3d 1181 (9th Cir. 2002) 28

Mayo Foundation for Med. Educ. & Research v. *United States*, 131 S. Ct. 704 (2011) 24

Natural Res. Def. Council v. *Train*, 396 F. Supp. 1393 (D.D.C. 1975), aff'd *sub nom. Natural Res. Def. Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977) 7

Newton County Wildlife Association v. *Rogers*, 141 F.3d 803 (8th Cir. 1998) 25, 26

Rapanos v. *United States*, 547 U.S. 715 (2006) 34

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 17

SWANCC v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) 34

Talk America, Inc. v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (2011) 16

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 16

Waterkeeper Alliance v. *EPA*, 399 F.3d 486 (2d Cir. 2005) 32

STATUTORY AND REGULATORY MATERIALS

28 U.S.C. § 1254 1

33 U.S.C. § 1251 ..... 5, 34

33 U.S.C. § 1288 ..... 6, 17

33 U.S.C. § 1311 5

33 U.S.C. § 1313 6

33 U.S.C. § 1314 ..... 6, 17

33 U.S.C. § 1319 33

33 U.S.C. § 1329 6

33 U.S.C. § 1342 ..... *passim*

33 U.S.C. § 1362 ..... 5, 17

33 U.S.C. § 1365 ..... 1, 15, 29, 33

33 U.S.C. § 1369 ..... 15, 29, 30

40 C.F.R. § 122.24 28

TABLE OF AUTHORITIES—continued

Page(s)

40 C.F.R. § 122.26 ..... 10, 20, 21

40 C.F.R. § 122.27 ..... *passim*

40 C.F.R. § 124.85 (1976) 8, 18

40 C.F.R. § 125.4 (1975) 6, 18

40 Fed. Reg. 56932 (Dec. 5, 1975)..... 7, 19, 20, 34

41 Fed. Reg. 6281 (Feb. 12, 1976)..... *passim*

41 Fed. Reg. 24709 (June 18, 1976)..... 8, 18, 19, 20

45 Fed. Reg. 33290 (May 19, 1980)..... 9, 18

55 Fed. Reg. 20521 (May 17, 1990)..... 9, 19, 20

55 Fed. Reg. 47990 (Nov. 16, 1990) 10

64 Fed. Reg. 46058 (Aug. 23, 1999) 9

64 Fed. Reg. 68722 (Dec. 8, 1999)..... 11

65 Fed. Reg. 43586 (July 13, 2000)..... 9

Or. Rev. Stat. § 527.765 12

Or. Admin. R. § 629-625..... 13

MISCELLANEOUS

157 Cong. Rec. S4611 (daily ed. July 14, 2011)..... 30

TABLE OF AUTHORITIES—continued

Page(s)

Kevin Belt & Robert Campbell, *Silvics & Silviculture: The Agriculture of Trees*, available at www.wvu.edu/~agexten/forestry/silvics.htm 17

The Clean Water Act Handbook (M. Ryan ed. 2003) 5

EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program* (Mar. 1995) .....*passim*

EPA, *Stormwater Phase II Final Rule, Construction Site Runoff Control, Minimum Control Measures* (rev'd Dec. 2005) 11

EPA, *NPDES Permit Writers Manual*, http://www.epa.gov/npdes/pubs/pwm_2010.pdf 32

EPA Office of Water, *General Permit Program Guidance* (1988) 32

John Gifford, *Practical Forestry* (1907) 17

House Comm. on Oversight and Government Reform, Subcomm. on Regulatory Affairs, *Assessing the Cumulative Impact of Regulation on U.S. Manufacturers* (Mar. 9, 2011) 31

TABLE OF AUTHORITIES—continued

Page(s)

http://water.epa.gov/polwaste/nps/forestry/forestrymgmt_index.cfm 20

Jeffrey M. Jaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVT'L L. REV. 409 (2007)..... 32

S. Rep. 99-50 (S. 1128) (May 14, 1985), reprinted in 2 Leg. Hist of Water Quality Act of 1987..... 33

Erik Schilling, Nat'l Council for Air and Stream Improvement, *Compendium of Forestry Best Management Practices for Controlling Nonpoint Source Pollution in North America* (Tech. Bull. 966, Sept. 2009)..... 12, 33

W. Brad Smith *et al.*, *Forest Resources of the U.S., 2007*, available at http://www.fs.fed.us/nrs/pubs/gtr/gtr_wo78.pdf..... 31

Karen Sorali, U.S. Dep't of Agriculture Forest Service, *Forestry Best Management Practices in Watersheds*, available at http://www.epa.gov/owow/watershed/wacademy/acad2000/forestry/index.htm..... 12

U.S. Forest Service, *Implications of Decision in NEDC v. Brown to Silvicultural Activities on National Forest System Land*, Doc. 1570-1 (Sept. 7, 2010) 31

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 640 F.3d 1063. The opinion of the district court (App., *infra*, 48a-68a) is reported at 476 F.Supp.2d 1188.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. After the court of appeals extended the time to file, petitioners filed a timely petition for rehearing and rehearing en banc on October 5, 2010. The court issued an amended opinion on May 17, 2011. By order of the same date, the court denied the petitions for panel and en banc rehearing. App., *infra*, 2a. On August 4, 2011, Justice Kennedy extended the time for filing petitions for certiorari to September 14, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at App., *infra*, 69a-80a.

STATEMENT

Plaintiff Northwest Environmental Defense Center ("NEDC") brought a citizen suit under Clean Water Act ("CWA") § 505, 33 U.S.C. § 1365, against forest products companies, petitioners here, and the Oregon State Forester and members of the Oregon Board of Forestry (the "State defendants"). Petitioners American Forest & Paper Association, Oregon Forest Industries Council, and Tillamook County in-

tervened in support of defendants. Plaintiff alleges that defendants violated CWA §§ 301 and 402 because "ditches, channels, culverts, pipes and other 'point sources'" along the Trask and Sam Downs Roads and at "hundreds of other locations" throughout Oregon State Forests discharge precipitation runoff containing pollutants into Oregon waters without a National Pollutant Discharge Elimination System ("NPDES") permit. First Am. Cmplt. ¶¶ 1-6.

NEDC alleges that the Trask and Sam Downs Roads are State-owned roads used by petitioner companies for hauling timber. Under timber sale contracts with the Oregon Department of Forestry, petitioner companies maintain the roads as needed. Petitioners' use of these public roads, plaintiff alleges, creates sediment and other pollutants that are carried by runoff into roadside culverts and ditches and eventually deposited into navigable waters. First Am. Cmplt. ¶ 5. Plaintiff alleges that, as a result, defendants were required to obtain NPDES permits from Oregon's Department of Environmental Quality —to which EPA has delegated the NPDES program. *Id.* ¶¶ 32, 77. NEDC sought injunctive and declaratory relief, penalties, and attorneys' fees. *Id.* ¶ 1.

Defendants and intervenors moved to dismiss. As relevant here, their motion relied on EPA's Silvicultural Rule, 40 C.F.R. § 122.27, under which natural runoff from forest roads is categorized as nonpoint source activity that does not require an NPDES permit, and on EPA stormwater regulations that exclude forest road runoff from permitting. The United States filed an amicus brief in support of dismissal, urging deference to EPA's interpretation of the CWA and its own rules. App., *infra*, 93a-133a. The district court dismissed, reasoning that the roads and asso-

ciated runoff collection systems are nonpoint sources and that EPA's Silvicultural Rule applies. App., *infra*, 48a-68a.

The Ninth Circuit reversed, rejecting the views of EPA set forth in an amicus brief and at argument. App., *infra*, 1a-47a. It held, first, that although EPA *intended* the Silvicultural Rule to define runoff collected in ditches and culverts as a nonpoint source, those ditches and culverts are in fact point sources that require NPDES permits. Second, the court held, channeled runoff from forest logging roads is stormwater discharge "associated with industrial activity" under Section 402(p) of the CWA that must be permitted. These rulings conflict with decisions of the Second, Eighth, and Eleventh Circuits; disregard the proper relationship between executive and judicial authority set forth in this Court's precedents; and undermine the role of the States under the Clean Water Act.

EPA has not since passage of the CWA required permits for forest roads used to transport timber. By its Silvicultural Rule, it has for 35 years defined natural runoff from such roads—including runoff collected by drainage systems that are an integral part of forest road construction and operation—as nonpoint source pollution to be addressed by best management practices rather than point source effluent standards. EPA's position has repeatedly been set forth in iterations of the Silvicultural Rule, explanations of the rule, and briefs.

After 1987 amendments to the CWA established a new, two-phase, regime for regulating stormwater, EPA maintained the same position. When EPA implemented Congress's "Phase I" mandate that stormwater "associated with industrial activity" be

subject to NPDES, EPA provided that stormwater runoff defined by the Silvicultural Rule as nonpoint source was not covered by this requirement. And when EPA in "Phase II" considered what other stormwater might appropriately be permitted under NPDES, it weighed extending permitting to forest roads, but ultimately did not do so.

The Ninth Circuit not only disapproved EPA's interpretation of the Act and EPA's own rules, but also *required* EPA to regulate collected natural runoff from forest roads as stormwater "associated with industrial activity"—even though that statutory phrase plainly leaves discretion to EPA. Substituting its own views for those of the agency, the Ninth Circuit violated fundamental tenets of administrative law and created its own flawed environmental policy.

EPA's consistent position of 35 years is reasonable. Natural runoff over thousands of miles of forest roads is more effectively addressed, EPA determined, by best management practices ("BMPs") rather than by effluent limitations normally applied to end-pipe discharges. Indeed, Oregon has specifically required drainage systems like those on the Trask and Sam Downs Roads as BMPs to reduce water pollution.

The Ninth Circuit's ruling is environmentally counterproductive, forcing an effluent limitation regime onto natural runoff for which it is a poor fit. It would divert resources from addressing pollution through more effective BMPs to costly and time-consuming permitting and litigation. It could even, perversely, cause states to alter road drainage system requirements in order to reduce point-source permitting costs and risks. The Ninth Circuit should have deferred to EPA's long-standing interpretation of the CWA and its own regulations, as other courts

of appeals have done. This Court's review is urgently required to resolve the resulting split in the Circuits, to restore EPA and State authority, and to bring certainty to users of forest roads, who face the risk of criminal and civil penalties and citizen enforcement if permits are required.

A. The Federal Statutory Context.

The Clean Water Act balances federal and state powers, forming "a partnership" "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992).

CWA § 402 creates the NPDES permitting system for "point sources" that "discharge" "any pollutant" to U.S. waters. 33 U.S.C. § 1342(a); see CWA § 301(a), 33 U.S.C. § 1311(a). A "point source" is "any discernible, confined and discrete conveyance," including a "ditch, channel, tunnel [or] conduit," from which pollutants are discharged to navigable waters. CWA § 502(14), 33 U.S.C. § 1362(14). But the term "point source" expressly "does not include agricultural stormwater discharges." *Ibid.*

Beyond Section 402 and the separate Section 404 permit scheme for dredged and fill material, Congress largely left the task of addressing water pollution to the States, with federal assistance and oversight. See *The Clean Water Act Handbook* 191-220 (M. Ryan ed. 2003). Consistent with Congress's purpose to "preserv[e] and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "plan the development and use" of "land and water" (CWA § 101(b), 33 U.S.C. § 1251(b)), States are responsible for establishing

water quality standards (CWA § 303(a), 33 U.S.C. § 1313(a)) and for developing programs to manage nonpoint sources of water pollution like runoff. CWA §§ 208, 303(d), 319, 33 U.S.C. §§ 1288, 1313(d), 1329.

Congress understood that "nonpoint sources of pollutants" include "agricultural and silvicultural activities" such as "runoff from fields and crop and forest lands." CWA § 304(f)(1) & (2)(A), 33 U.S.C. § 1314(f)(1) & (2)(A). It directed EPA to assist States in developing "procedures and methods," including "land use requirements" like BMPs, "to control to the extent feasible" "silviculturally related nonpoint sources of pollution." 33 U.S.C. § 1288(b)(2)(F).

B. EPA's Silvicultural Rule.

1. Since passage of the CWA—the Ninth Circuit recognized—EPA has "treat[ed] all natural runoff" from most silvicultural activities "as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance" like a roadside ditch or culvert. App., *infra*, 22a; see *id.* at 24a ("collected runoff from silviculture" is "categorically" not subject to NPDES), 32a ("the intent of EPA" is to define "all natural runoff from silvicultural activities" as nonpoint source, "irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged").

EPA promulgated a rule in 1973 providing that "[d]ischarges of pollutants from agricultural and silvicultural activities," including "runoff" from "forest lands," "do not require an NPDES permit" unless identified by regulators "as a significant contributor of pollution." App., *infra*, 17a, quoting 40 C.F.R. § 125.4(j) (1975). When that rule was challenged, EPA told a district court that the "exempted catego-

ries" are "ill-suited for inclusion in a permit program." *Natural Res. Def. Council* v. *Train*, 396 F.Supp. 1393, 1395 (D.D.C. 1975), aff'd *sub nom. Natural Res. Def. Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

2. The district court in *Train* held the exemption in the 1973 rule too broad and suggested that EPA use its authority to identify specific nonpoint source activities as a means of managing its program. See 396 F.Supp. at 1401-1402 ("Congress intended for [EPA] to determine, at least in the agricultural and silvicultural areas, which activities constitute point and nonpoint sources"), aff'd, 568 F.2d at 1382 ("'power to define point and nonpoint sources is vested in EPA'").

When EPA revisited the rule, it explained that agriculture and silviculture "present runoff-related problems not susceptible to the conventional NPDES permit program including effluent limitations." App., *infra*, 18a-19a, quoting 40 Fed. Reg. 56932 (Dec. 5, 1975). EPA stated that "*whether or not the rainfall happens to collect before flowing into navigable waters*"—as "[a]gricultural and silvicultural runoff * * * frequently flows into ditches * * * before discharging"—such runoff "is more properly regulated under section 208" by States as "nonpoint in nature and should not be covered by the NPDES permit program." *Id.* at 19a (emphasis added).

Accordingly, when EPA proposed the Silvicultural Rule in 1976, it "determined that most water pollution related to silvicultural activities is nonpoint in nature." App., *infra*, 19a, quoting 41 Fed. Reg. 6282 (Feb. 12, 1976). "Only those silvicultural activities" where a discharge from a point source results from "controlled water used by a person" were to be

subject to NPDES permitting. *Id.* at 19a-20a. EPA's final rule identified four "controlled water" discharges—from "rock crushing, gravel washing, log sorting," and "log storage facilities." App., *infra*, 20a, citing 41 Fed. Reg. 24709, 24711 (June 18, 1976); 40 C.F.R. § 124.85 (1976). The Ninth Circuit explained that in consequence of this rule, "[a]ny other silvicultural discharge of pollutants, even if made through a discernible, defined and discrete conveyance, was considered a nonpoint source of pollutants." App., *infra*, 20a.

EPA explained its basis for defining most silvicultural discharges as nonpoint source: the pollutants discharged were "induced by natural processes, including precipitation" and "runoff"; were "not traceable to any discrete and identifiable facility"; and were "better controlled through the utilization of best management practices." App., *infra*, 21a, quoting 41 Fed. Reg. 24710 (June 18, 1976). Under these criteria, the final rule stated in a comment, "[t]he term 'silvicultural point source' * * * does not include nonpoint source activities inherent to silviculture such as * * * surface drainage, and road construction and maintenance from which runoff results from precipitation events." *Id.* at 22a, quoting 40 C.F.R. § 124.85 (1976). EPA stated that, pursuant to this rule, "'*ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program.*'" *Id.* at 23a, quoting 41 Fed. Reg. 6282 (Feb. 12, 1976) (emphasis added). Rather, "runoff from road construction and maintenance for the purposes of forest management falls more generally under the characteristics of nonpoint source pollution." 41 Fed. Reg. 24711 (June 18, 1976).

3. The current version of EPA's Silvicultural Rule, promulgated in 1980, differs "in only minor respects." App., *infra*, 26a. It retained the four "silvicultural point sources." 40 C.F.R. § 122.27(b), App., *infra*, 26a-27a. And it moved the definition of "nonpoint source silvicultural activities" from the comment to the text of the rule, slightly modifying the language to provide that nonpoint source activities include "surface drainage, or road construction and maintenance from which there is natural runoff." *Ibid.*; see 45 Fed. Reg. 33290, 33446-33447 (May 19, 1980).

Substituting "from which there is natural runoff" for "from which runoff results from precipitation events" was not a substantive change. EPA made clear that after this change, runoff from forest roads, "*although sometimes channeled*," remains "non-point source in nature" because it is "caused solely by natural processes, including precipitation and drainage," is "not otherwise traceable to any single identifiable source," and is "best treated by non-point source controls." 55 Fed. Reg. 20521, 20522 (May 17, 1990) (emphasis added).

4. In 1999, EPA proposed to modify 40 C.F.R. § 122.27 to replace the categorical treatment of runoff from silvicultural activities with case-by-case consideration of whether a permit is required in order to achieve water quality standards. See 64 Fed. Reg. 46058, 46077, 46088 (Aug. 23, 1999). Following public comment EPA abandoned that proposal. See 65 Fed. Reg. 43586, 43652 (July 13, 2000).

C. Stormwater Regulation Under The 1987 Amendments To The Clean Water Act.

As enacted in 1972 the CWA made no distinction between stormwater and other sources of pollutants. But in 1987 Congress enacted a new two-step regime for regulating point sources that convey stormwater into navigable waters. 33 U.S.C. § 1342(p).

In Phase I, Congress identified five classes of stormwater discharges that required NPDES permits, including discharges "associated with industrial activity." CWA § 402(p)(1)-(3), 33 U.S.C. § 1342(p)(1)-(3). EPA's 1990 regulations implementing Phase I defined "associated with industrial activity" to mean discharges "*directly related* to manufacturing, processing, or raw materials storage areas *at an industrial plant*." 40 C.F.R. § 122.26(b)(14) (emphasis added). And they provided that Phase I permitting does not apply to "discharges from facilities or activities excluded from the NPDES program under this Part 122" (*ibid.*), which includes the silvicultural exclusion at § 122.27. See 55 Fed. Reg. 47990, 48011 (Nov. 16, 1990) ("existing regulations at 40 CFR 122.27 currently define the scope of the NPDES program with regard to silvicultural activities," and "EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking").

Phase II required EPA to consider whether additional stormwater discharges should be subject to NPDES. CWA § 402(p)(6). In developing Phase II regulations, EPA explained that its Phase I regulations excluded "runoff from agricultural and silvicultural activities." EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program*, at 2-23 n.8 (Mar. 1995). And in listing "Timber Products Facilities" that are "associated

with industrial activity" and hence subject to Phase I permitting, EPA identified cutting, planing, loading, sorting and storing logs, and manufacturing, assembling, and preserving wood products, but not the use of forest roads to transport timber. *Id.*, Appendix E, at E-2-3.

In Phase II rules promulgated in 1999, EPA designated two categories of stormwater discharge that "present a high likelihood of having adverse water quality impacts": small municipal storm sewer systems and some construction sites. EPA, *NPDES—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges*, 64 Fed. Reg. 68722, 68734 (Dec. 8, 1999). EPA reached this decision after considering studies that showed urban storm sewers and construction pollution were a much more serious problem than pollution from "agricultural" or "silvicultural" sources. *Id.* at 68726-68727. See EPA, *Stormwater Phase II Final Rule, Construction Site Runoff Control, Minimum Control Measures* 1 (rev'd Dec. 2005) ("Sediment runoff rates from construction sites" are "1,000 to 2,000 times greater than those of forest lands").

An environmental group challenged EPA's decision not to require Phase II permitting of discharges from roads used for logging. In *Environmental Defense Center* v. *EPA*, 344 F.3d 832, 861 (9th Cir. 2003), the Ninth Circuit remanded the rule to EPA to explain its decision not to apply NPDES to forest roads under Phase II, but did not strike down the rule. Since 2003, EPA has taken no public action on that remand.

D. Oregon's Regulation Of Runoff From Forest Roads.

Consistent with this statutory and regulatory scheme, States regulate forestry operations, including forest roads, using best management practices adapted to their own "climate, soils, topography, and aquatic biota." Erik Schilling, Nat'l Council for Air and Stream Improvement, *Compendium of Forestry Best Management Practices for Controlling Nonpoint Source Pollution in North America* 194 (Tech. Bull. 966, Sept. 2009). EPA provides States with guidance in the design and implementation of BMPs. See, *e.g.*, Karen Sorali, U.S. Dep't of Agriculture Forest Service, *Forestry Best Management Practices in Watersheds*, available at http://www.epa.gov/owow/watershed/wacademy/acad2000/forestry/index.htm. And "all jurisdictions in North America with substantial levels of timber harvest have made substantial investments in their forestry [nonpoint source] control programs," which are "based on BMPs that have been proven effective through research and practical experience" and that are backed by "monitoring programs" that "report generally high levels of compliance and/or few significant risks to water quality." Schilling, *supra*, at 196.

Like other States, Oregon regulates runoff from forest roads as nonpoint source pollution. By statute, the Oregon Board of Forestry is charged, in consultation with Oregon's Environmental Quality Commission, with establishing BMPs "to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair" achievement of the State's water quality standards. Or. Rev. Stat. § 527.765(1), (2).

Oregon's Board of Forestry has promulgated "standards for locating, designing, constructing and maintaining efficient and beneficial forest roads" in a manner that provides "maximum practical protection" for "water quality." Or. Admin. R. § 629-625-0000(3). Roads must be located, constructed, and operated to minimize "risk of sediment delivery to waters of the state." *Id.* § 629-625-0330; see *id.* § 629-625-0200(2) & -0300(2). To meet this goal, road operators must "provide a drainage system" that satisfies six criteria. *Id.* § 629-625-0330(1). As Oregon explained to the Ninth Circuit, "drainage ditches and culverts" are among the "best management practices" it has adopted. Br. of the State Appellees, No. 07-35266, at 18-20.

E. The District Court's Decision Dismissing Plaintiff's Suit.

The District Court dismissed NEDC's suit for failure to state a claim. Judge King determined that under the Silvicultural Rule "the building and maintenance of the forest roads and the hauling of timber on the roads" are "not point sources when the natural runoff flows into the waters of the United States." App., *infra*, 62a. Rather, the "road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources." *Ibid.* In so holding, the District Court deferred to EPA's interpretation of its own rule, citing *Auer* v. *Robbins*, 519 U.S. 452 (1997).

Given this holding, the court did not reach the question whether those discharges are otherwise excluded from permitting under the stormwater amendments and regulations. It did, however, reject plaintiff's argument that NPDES permits are re-

quired as a result of the Ninth Circuit's previous remand of EPA's Phase II regulations in *EDC*, 344 F.3d 832. As the District Court explained, the Ninth Circuit remanded to allow EPA to address objections and thereby "'permit judicial review,'" not because the regulations were substantively deficient. App., *infra*, 65a-66a. And "'[w]hen [EPA's] Phase II regulations went into effect, a stormwater discharge left unregulated'" as a point source, like forest road runoff, complied with the CWA. *Id.* at 67a.

F. The Ninth Circuit's Decision Ordering EPA To Regulate Forest Road Runoff As An Industrial Stormwater Discharge.

The Ninth Circuit reversed. It conceded that when read to "reflect the intent of EPA," the Silvicultural Rule defines "natural runoff from silvicultural activities" as a nonpoint source regardless of whether "the runoff is collected, channeled, and discharged into protected water." App., *infra*, 32a. But the court thought this reading inconsistent with the CWA's definition of "point source." It substituted its own reading of the rule—one it acknowledged "does not reflect the intent of EPA." *Ibid.* Under the court's reading, forest road runoff is nonpoint source "only as long as the 'natural runoff' remains natural" and is not "channeled and controlled." *Ibid.*

The Ninth Circuit then held that the discharges at issue are "associated with industrial activity" and thus require NPDES permits under Phase I of EPA's stormwater regulations. App., *infra*, 38a. It did so even though it acknowledged that EPA regulations define "discharges 'associated with industrial activity'" not to include discharges that are "excluded from the NPDES program under [the Silvicultural Rule]." *Ibid.*; see *ibid.* (the "preamble to the Phase I

regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p)").

In response to petitions for rehearing, the Ninth Circuit addressed whether it had subject matter jurisdiction to reject EPA's reading of the Silvicultural Rule under 33 U.S.C. § 1365(a). App., *infra*, 5a-7a. According to the court, jurisdiction turned on whether the Silvicultural Rule is ambiguous. If *un*ambiguous, then NEDC would have had to challenge the Rule within 120 days of its issuance, a window that closed decades ago. 33 U.S.C. § 1369(b)(1). But because the court concluded the rule is ambiguous, it found jurisdiction. It held that NEDC's challenge is based on "grounds which arose after such 120th day," because the United States' definitive interpretation of the rule occurred for the first time in this litigation. App., *infra*, 7a. The court did not reconcile this reasoning with its own citations to EPA materials dating back to 1976 that clearly state that channeled forest road runoff is nonpoint source. Nor did it explain the jurisdictional basis for its rejection of EPA's Phase I rule.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Ninth Circuit, in conflict with decisions of other circuits, cast aside more than three decades of EPA regulation and impermissibly imposed its own reading of the CWA on EPA, the States, and the regulated community. In doing so, it violated the most basic tenets of judicial review of administrative action, upended the federal-state balance struck by Congress, and imposed a costly and poor-fitting effluent-control regime that is more likely to harm than help the environment. These errors also led the

court of appeals to assert jurisdiction when the time for challenging the Silvicultural Rule (in the court of appeals in the first instance, not the district court) expired decades ago. The vast reach of the Ninth Circuit over hundreds of millions of acres of western forests magnifies the impact of its erroneous decision.

I. IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, THE NINTH CIRCUIT FAILED TO DEFER TO EPA'S INTERPRETATION OF THE CLEAN WATER ACT.

A. This Court's Precedents Require Deference To EPA's Silvicultural And Stormwater Rules.

This Court's precedents establish the deference due by a court to an agency's interpretation of a statute. When Congress has delegated to an agency the authority to implement a statute by rulemaking—as Congress did here—"a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); see *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). Furthermore, an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); see *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S.Ct. 2458, 2472-2474 (2009) (deferring to EPA's reasonable explanation of ambiguous CWA regulations, set forth in an internal memorandum); *Talk America, Inc.* v. *Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2260-2262 (2011). This Court has explained that def-

erence is necessary because "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

The Ninth Circuit violated these precepts. It accorded no deference at all to EPA's rules or interpretation of those rules. And it commanded EPA to interpret the statutory phrase "associated with industrial activity" to include discharges of channeled forest road runoff, thereby substituting its own views for those of the expert agency and wreaking havoc on a regulatory scheme that has been in place for more than 35 years.

1. On its face, the CWA defines the term "point source" "not [to] include agricultural stormwater discharges." CWA § 502(14), 33 U.S.C. § 1362(14). Silviculture is a form of agriculture. *E.g.*, www.wvu.edu/~agexten/forestry/silvics.htm ("Silviculture is the agriculture of trees"); John Gifford, *Practical Forestry* 12 (1907) ("silviculture is a branch of agriculture"). Congress treated the two together when it specified in section 304(f) of the Act that "nonpoint sources of pollutants" include "agricultural and silvicultural activities" like "runoff from fields and crop and forest lands." 33 U.S.C. § 1314(f)(1) & (2)(A). See 33 U.S.C. § 1288(b)(2)(F) (directing EPA to assist States to develop BMPs "to control to the extent feasible" "agriculturally and silviculturally related nonpoint sources of pollution").

2. Consistent with this Congressional intent, EPA has always treated precipitation runoff from

silvicultural activities as nonpoint source in nature. Its 1973 rule broadly exempted "[d]ischarges of pollutants from agricultural and silvicultural activities." 40 C.F.R. § 125.4(j) (1975). In promulgating the Silvicultural Rule in 1976, EPA "determined that most water pollution related to silvicultural activities is nonpoint in nature." 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976). It required an NPDES permit only for silvicultural discharges resulting from "controlled water use"—specifically in "rock crushing, gravel washing, log sorting," and "log storage facilities." 41 Fed. Reg. 24709, 24711 (June 18, 1976); 40 C.F.R. § 124.85 (1976). Precipitation runoff from forest roads is none of those, and does not result from the controlled use of water.

The current version of the Silvicultural Rule continues to define a "silvicultural point source" as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities." 40 C.F.R § 122.27(b). And it expressly defines as "nonpoint source" all discharges from "surface drainage, or road construction and maintenance from which there is natural runoff." *Ibid.*; see 45 Fed. Reg. 33290, 33446-33447 (May 19, 1980). EPA considered replacing this categorical definition for case-by-case inquiry, but decided against making that change. See *supra*, p. 9.

3. Throughout, EPA has left no doubt that precipitation runoff from forest roads is nonpoint source in nature even when it is channeled by roadside ditches and culverts. In 1975, EPA explained that "silvicultural runoff * * * frequently flows into ditches" before discharge, but that "whether or not the rainfall happens to collect before flowing into

navigable waters," it "is properly regulated under section 208" by States as "nonpoint in nature and should not be covered by the NPDES permit program." 40 Fed. Reg. 56932 (Dec. 5, 1975).

Accordingly, in promulgating the 1976 Rule, EPA stated that "'ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be the subject of the § 402 permit program.'" 41 Fed. Reg. at 6282 (Feb. 12, 1976). See also 41 Fed. Reg. 24709 (June 18, 1976) ("Insofar as [surface] drainage serves only to channel diffuse runoff from precipitation events, it should also be considered nonpoint in nature"); 55 Fed. Reg. 20521, 20522 (May 17, 1990) (runoff from forest roads, "although sometimes channeled," is "non-point source in nature"). The Ninth Circuit thus correctly discerned that EPA treats "discharges of 'natural runoff' [as] nonpoint sources of pollution, even if" they "are channeled and controlled" through ditches and culverts. App., *infra*, 27a.

This interpretation reflects EPA's practice. EPA does not, in fact, require NPDES permits for channeled forest road runoff, and has not done so since passage of the CWA. Instead, EPA provides states with information and assistance to promulgate best management practices to control forest road runoff. And states have in fact adopted and monitored BMPs best suited to their own conditions, providing effective nonpoint source regulation. See *supra*, pp. 12-13.

4. EPA has provided cogent reasons for not requiring permits for silvicultural runoff. See *Chemical Mfrs. Ass'n* v. *Nat. Res. Def. Council*, 470 U.S. 116, 125 (1985) (EPA's interpretation must be upheld if it "is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA"). From the

start, EPA explained that effluent limitations are not a reasonable or practical means to address silvicultural precipitation runoff. See 40 Fed. Reg. 56932 (Dec. 5, 1975). The three pillars of EPA's interpretation are that runoff is "induced by natural processes, including precipitation"; is "not traceable to any discrete and identifiable facility"; and is "better controlled through the utilization of best management practices" than effluent limitations. 41 Fed. Reg. at 24710 (June 18, 1976); see 55 Fed. Reg. 20521, 20522 (May 17, 1990); http://water.epa.gov/polwaste/nps/forestry/forestrymgmt_index.cfm (describing EPA-recommended BMPs).

5. After Congress enacted a new regime for stormwater regulation in 1987, EPA continued to treat channeled runoff from forest roads as nonpoint source in nature. Congress in section 402(p) required EPA to establish "Phase I" permitting for point source discharges of stormwater "associated with industrial activity." In implementing that provision, EPA limited permitting to point source discharges "directly related to manufacturing, processing, or raw materials storage areas at an industrial plant"—language that on its face does not describe runoff from public roads used to haul timber. 40 C.F.R. § 122.26(b)(14). The statutory terms "associated with" and "industrial activity" "comfortably bea[r] the meaning the [Administrator] assigns" in that regulation. *Auer*, 519 U.S. at 461.

Furthermore, EPA's rule provides that the Phase I permit requirement "does not include discharges from facilities or activities excluded from the NPDES program under this Part 122." 40 C.F.R. § 122.26(b)(14). That provision incorporates the settled meaning of the Silvicultural Rule, described

above, to exclude channeled stormwater runoff from forest roads.[1]

In Phase II, EPA studied discharges from forest products facilities, explained which ones qualified as associated with industrial activities, and chose not to require permits for channeled discharges from forest roads, signaling no change from its long-held position under the Silvicultural Rule. See *supra*, pp. 10-11.

6. EPA has maintained the same position in litigation. In a 2003 brief urging dismissal of a suit alleging that runoff from forest roads collected in "ditches, channels, pipes, [and] culverts" must be permitted, EPA told the court that "discharge associated with an industrial activity" "'does not include discharges from facilities or activities excluded from the NPDES program under this part 122'"; that Part 122.27 "excluded runoff from certain silvicultural activities from the NPDES program"; and that, "[c]onsequently, EPA did not incorporate silvicultural storm water discharges into the definition of 'storm water discharges associated with industrial activities.'" EPA's Mem. in Support of PALCO's Mot. to Dismiss, *Env. Protection Info. Ctr.* v. *Pacific Lumber Co.*, No. C01-2821 (N.D. Cal. filed Nov. 17, 2003),

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[1] EPA included in Phase I regulation timber-related industrial facilities that fall within Standard Industrial Code groupings 10 through 45, such as lumber mills, including their "industrial plant yards" and "immediate access roads." 40 C.F.R. § 122.26(b)(14); see EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program*, at 2-22 to 23 & E-2 to 4 (Mar. 1995). But EPA observed that "NPDES regulations specifically exempt some categories of activity from the definition of point source, including storm water runoff from agricultural sources and silviculture activities. *Id.* at 2-23 n.8.

at 4, App., *infra*, 86a-87a. Furthermore, "EPA declined to regulate discharges from forest roads in the Phase II rulemaking." *Id.* at 6, App., *infra*, 90a. Accordingly, EPA explained, "storm water discharges from forest roads are not currently subject to NPDES permit requirements, and will not be subject to them, unless and until EPA regulates them under" Phase II (App., *infra*, 91a)—which EPA has not done in the eight years since it filed that brief. See also U.S. Amicus Br. in *Conservation Law Foundation* v. *Hannaford Bros.*, No. 2:03-cv-00121 (D. Vt. filed Jan. 23, 2004).

To the district court here, the United States explained why "forestry roads like those at issue in this case are not required to secure NPDES permits under a proper construction of section 402 of the CWA," and why "[a] contrary determination would have significant implications for EPA." U.S. Amicus Br., *NEDC* v. *Brown*, 3:06-cv-01270 (N.D. Or. filed Dec. 6, 2006), at 2, App., *infra*, 98a. Among other things, the United States pointed out that because "ditches [and] culverts" are "an integral part of forest roads," "reading them as outside the scope of the [Silvicultural Rule] does not make any sense because it defeats the plain language of the regulation." *Id.* at 17, App., *infra*, 114a. And it called for "[e]levated deference" because EPA "has 'consistently followed' the same interpretation of its regulations." App., *infra*, 115a.

In its brief to the Ninth Circuit, the U.S. again explained that "EPA has made it clear that the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts." U.S. Amicus Br., *NEDC* v. *Brown*, No. 07-35266 (9th Cir. filed Nov. 15, 2007), at 25. See *Auer*,

519 U.S. at 462 (that an "interpretation comes to us in the form of a legal brief" does not "make it unworthy of deference"); *Chase Bank USA* v. *McCoy*, 131 S.Ct. 871, 881 (2011).[2]

7. Congress has never interfered with EPA's position of three decades that channeled forest road runoff is not subject to NPDES—including when it adopted stormwater amendments to section 402 in 1987 that provided ample opportunity to address stormwater from forest roads. "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the inter-

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[2] In its first brief to the Ninth Circuit, on which counsel for EPA is listed, the United States argued that the Court lacked jurisdiction over plaintiff's suit because it was a too-late attack on the Silvicultural Rule. The Ninth Circuit initially did not address jurisdiction, but thereafter sought additional briefing on that issue. The United States's brief on jurisdiction (which listed no counsel from EPA) stated that because the court had held that the Silvicultural Rule was ambiguous, the district court had citizen suit jurisdiction. A footnote stated: "neither the rule itself nor EPA statements in the preamble clearly addressed" whether "channeled and collected runoff is included in the term 'natural runoff.' The first time EPA expressed in an official document its interpretation that 'natural runoff' would include runoff that is channeled, ditched or culverted into manmade structures was in its *amicus* brief in this matter." Amicus Br. of the U.S. Responding to the Court's Questions of Oct. 21, 2010, filed Feb. 10, 2011, at 10 n.5. This statement must rest on a narrow conception of "official document" and be narrowly focused on the preamble to the final 1980 rule, for as we demonstrate in this petition, and as the Ninth Circuit's opinion shows, EPA has taken this position for decades in regulatory pronouncements and briefs, not to mention in its day-to-day application of the CWA.

pretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986).

8. In these circumstances, *Chevron* deference is appropriate. EPA's Silvicultural Rule and stormwater regulations are clear, are reasonable interpretations of the statute, and exclude channeled forest road runoff from permitting by definition. EPA had ample authority to interpret the phrase "associated with industrial activity" to exclude forest road runoff. *E.g.*, *Mayo Foundation* v. *United States*, 131 S.Ct. 704, 711 (2011).

Even if the regulations did not provide a "definitive answer" to the question whether a permit is required, "agency interpretation and agency application of the regulation[s]" lead to the same result. *Coeur Alaska*, 129 S.Ct. at 2473. EPA's consistent statements in regulatory materials and briefs, and its consistent practice, stretching over 35 years, is entitled to deference under *Auer* because it not plainly erroneous or inconsistent with the silvicultural or stormwater regulations. 519 U.S. at 461-463. See U.S. Amicus Br., *NEDC* v. *Brown*, No. 07-35266 (9th Cir.), at 24 (arguing for *Chevron* and *Auer* deference).

The Court should grant this petition to restore EPA's long-held and reasonable interpretations of the CWA's text and EPA's own silvicultural and stormwater rules, to which this Court's decisions require deference, and to reverse the Ninth Circuit's extraordinary decision that EPA *must* interpret "associated with industrial activity" to encompass channeled runoff from forest roads.

B. The Ninth Circuit's Ruling Conflicts With Decisions Of Other Circuits.

Other courts of appeals have ruled that NPDES permits are not required in circumstances like those at issue here. In *Newton County Wildlife Association* v. *Rogers*, 141 F.3d 803, 810 (8th Cir. 1998), the Eighth Circuit confronted the argument—in the context of a suit by environmental groups against the U.S. Forest Service to prevent timber sales in the Ozark National Forest—that the Service "failed to obtain necessary NPDES" permits for "discharges of pollutants that will accompany logging and road construction under the timber sales."

Just as Oregon requires construction of drainage systems as BMPs, it was "undisputed" in *Newton County* that "the logging roads that the Forest Service designed, engineered, staked and required the [timber] purchasers to construct" include "'culverts and road-side ditches." Reply Br. of Appellants, *Newton County Wildlife Ass'n* v. *Rogers*, No. 97-1852 (8th Cir. filed Oct. 14, 1997), at 30. Plaintiffs argued that these "culverts and other discrete sources and conveyances" were point sources requiring permits; that EPA's Silvicultural Rule "says nothing about silvicultural *point* sources such as culverts"; and that the district court's ruling that no permit was required "is contrary both to the plain language of the regulation and to the purposes of the statute." Br. of Appellants, filed July 9, 1997, at 42-43; see Reply Br., *supra*, at 29-30 ("culverts" and "road-side drainage ditches" are "point sources subject to NPDES," "regardless whether these improvements are constructed for a 'logging road'").

The Eighth Circuit rejected these arguments as "without merit." 141 F.3d at 810. Judge Loken ex-

plained for a unanimous court that "EPA regulations do not include the logging and road building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Ibid.* Thus—in direct conflict with the Ninth Circuit—the Eighth Circuit deferred to EPA's distinction in the Silvicultural Rule between a narrowly defined set of point source discharges from silviculture that require permits, and other discharges, including those from logging roads, that do not require permits. In the Eighth Circuit, the forest road runoff at issue here would not be subject to NPDES.

The Ninth Circuit's decision conflicts too with *Conservation Law Foundation* v. *Hannaford Bros. Co.*, 327 F.Supp.2d 325 (D. Vt. 2004), aff'd, 139 F. App'x 3381 (2d Cir. 2005) ("*CLF*"). There, the district court rejected plaintiff's argument that a permit was required for a commercial property's "storm drain and pipe"—a collection system that carried stormwater runoff to a brook that emptied to navigable waters. 327 F.Supp.2d at 326. The court "assumed" the drain and pipe were a point source. *Ibid.* But in contradiction to the Ninth Circuit here, it rejected the contention that "all permit-less stormwater discharges are prohibited" by the Act "even though neither EPA" nor State regulators required a permit. *Id.* at 330, 333; see also *id.* at 330 (the Act "cannot be interpreted to require NPDES permits for all stormwater discharges notwithstanding [EPA's] regulations"). The Second Circuit summarily affirmed that ruling "[f]or substantially the reasons stated by the district court." 139 F. App'x at 338.

The court recognized in *CLF* that Congress "grant[ed] EPA discretion to determine that certain

stormwater discharges require regulation while others do not," and that "EPA is not mandated to control all stormwater discharges." 327 F.Supp.2d at 330. The Ninth Circuit, by contrast, gutted EPA's discretion by overriding EPA's regulation specifying that forest road runoff is not regulated as runoff "associated with industrial activity" under Phase I, and by overriding EPA's decision not to require NPDES permits for such runoff under Phase II. Applying the district court's reasoning in *CLF*—which the Second Circuit deemed worthy of summary affirmance—would lead to the conclusion that the forest roads at issue in this case do not require NPDES permits.

The Eleventh Circuit, addressing the agricultural exemption, reached the same result. In *Fishermen Against the Destruction of the Environment* v. *Closter Farms*, plaintiff contended that Closter Farms required an NPDES permit for a drainage system that channeled precipitation runoff from agricultural lands then pumped it into a lake. 300 F.3d 1294 (11th Cir. 2002). Observing that the "CWA specifically exempts 'agricultural stormwater discharges * * *' from the definition of a point source," the Eleventh Circuit held that no permit was required. *Id.* at 1297. By contrast to the Ninth Circuit here, the Eleventh Circuit held that "[t]he fact that the stormwater is pumped into Lake Okeechobee rather than flowing naturally into the lake does not remove it from the exemption. Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow." *Ibid.*

The confusion on display in the Ninth Circuit's own decisions casts further doubt on its ruling. Here, the Ninth Circuit commanded EPA to permit collected runoff from forest roads as Phase I stormwater

"associated with industrial activity." But in *EDC*, 344 F.3d at 862, 879, the Ninth Circuit held that EPA had not adequately explained its decision to not require NPDES permits for forest roads *under Phase II*, remanding "so that EPA may consider in an appropriate proceeding the Environmental Petitoners' contention that § 402(p)(6) requires EPA to regulate forest roads." As EPA explained below, "[o]bviously, if forestry roads were already covered by Phase I, this remand would have been unnecessary." U.S. Amicus Br., No. 3:06-CV-01270, *NEDC* v. *Brown* (D. Or. filed Dec. 6, 2006), at 27, App., *infra*, 127a. Other Ninth Circuit rulings display similar inconsistency. See *League of Wilderness Defenders* v. *Forsgren*, 309 F.3d 1181, 1185-1186 (9th Cir. 2002) (holding aerial spraying of pesticides "directly into rivers" from a "point source" requires NPDES permit, but distinguishing that activity from "silvicultural pest control activities from which there is natural runoff"); *id.* at 1184 ("the most common example of nonpoint source pollution is the residue left on roadways by automobiles"); *Association to Protect Hammersley, Eld & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1018-1019 (9th Cir. 2002) (upholding EPA regulation defining certain "concentrated aquatic animal production facilities" as nonpoint sources, 40 C.F.R. § 122.24(a), though rafts housing mussel farms were "vessels" included in the statutory definition of a point source; "To hold that these facilities are * * * point sources under the statutory definition would render EPA's criteria [for permitting] superfluous and undermine the agency's interpretation of the [CWA]").

C. The Ninth Circuit's Errors On The Merits Led It To Err In Finding Subject Matter Jurisdiction.

Because of errors it made in interpreting the Silvicultural Rule and stormwater amendments and rules, the Ninth Circuit also erred in exercising subject matter jurisdiction. As the United States and petitioners argued below, this suit is properly viewed as a direct challenge to EPA's rules. It does not allege a violation of an "effluent standard or limitation" under 33 U.S.C. § 1365(a). It therefore should have been filed within 120 days of the rules' promulgations, and filed in a court of appeals in the first instance—neither of which requirements were met. 33 U.S.C. § 1369(b)(1); see also *id.* § 1369(b)(2) ("Action of the Administrator with respect to which review could have been obtained under [§ 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement").

Plaintiff's challenge to the Silvicultural Rule should have been brought within 120 days of the Rule's last promulgation in 1980, in a court of appeals, because it was clear at that time that the Rule excluded channeled runoff from NPDES permitting. And because EPA excluded this runoff defined in the Silvicultural Rule from the scope of its Phase I regulations, it has been clear since those regulations were promulgated in 1990 that channeled forest road runoff is not a stormwater discharge associated with industrial activity.

The Ninth Circuit exercised jurisdiction because it held that the Silvicultural Rule is ambiguous and that the United States resolved that ambiguity for the first time in this lawsuit. *Supra*, p. 23 & n.2; see 33 U.S.C. § 1369(b)(1) (allowing citizen suit after 120

days when "based solely on grounds which arose after such 120th day"). But EPA's position has been clear for decades. A court may not disregard EPA's regulations and rule interpretations, invent ambiguity where none exists, and thereby resurrect a woefully untimely rule challenge. To allow the Ninth Circuit to do so here would destroy the repose Congress granted in Section 1369(b)(1) and bring uncertainty to every longstanding EPA regulation. This serious error too warrants this Court's review.

II. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE AND IS RIPE FOR THIS COURT'S REVIEW.

Left undisturbed the Ninth Circuit's decision threatens economic and regulatory havoc. As Senator Ron Wyden stated, "[i]f this decision is allowed to stand, every use of forest roads will require permitting and will therefore be subject to challenge by citizen lawsuits," which will "overburden landowners and managers in the Ninth Circuit states by adding significant compliance and permitting costs," and "create an opportunity for administrative appeal and litigation every time a permit is approved." 157 Cong. Rec. S4611 (daily ed. July 14, 2011). That would undermine logging operations and "deny States the use of their forests which they depend on to pay for schools and services, while significantly depressing the investment required to sustain private forestry." *Ibid.* Furthermore, the ruling upsets the balance of responsibilities between the States and the federal government, and it interferes with good environmental stewardship.

1. The Ninth Circuit's decision severely impacts owners of public and private forest roads throughout the west and Alaska and Hawaii. NEDC alleges that

there are "hundreds" of locations in Oregon State Forests alone that require permits. First Am. Cmplt. ¶ 6. Nationwide, the U.S Forest Service—an agency within the Department of Agriculture—has jurisdiction over 193 million acres of forestland and 378,000 miles of roads and predicts that the Ninth Circuit's ruling could require it to obtain up to 400,000 permits. U.S. Forest Service, *Implications of Decision in NEDC v. Brown to Silvicultural Activities on National Forest System Land*, Doc. 1570-1, at 3 (Sept. 7, 2010). Millions of acres of state-owned forests throughout the Ninth Circuit will also be affected. States own 75 million acres of forestland nationwide, and in Alaska and Hawaii fully 20 percent of forestlands are state owned. W. Brad Smith *et al., Forest Resources of the U.S., 2007*, at 19-20, available at http://www.fs.fed.us/nrs/pubs/gtr/gtr_wo78.pdf.

The decision's effect on the forest products industry would be severe. Private forests provide 2.5 million jobs and $87 billion in wages to American families.[3] Under the Ninth Circuit's ruling, roads servicing the Nation's 423 million acres of privately owned forestland would require countless permits. See Smith, *supra*, at 12.

The burden of NPDES permitting is substantial. Obtaining a permit involves a labyrinthine application process that includes public hearings and comments, extensive water sampling and testing, effluent limitations, strict technological standards, exten-

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[3] Statement of David P. Tenny, President and CEO, National Alliance of Forest Owners, Before the House Committee on Oversight and Government Reform, Subcomm. on Regulatory Affairs, *Assessing the Cumulative Impact of Regulation on U.S. Manufacturers* (Mar. 9, 2011).

sive monitoring, and the treatment of pollutants. See EPA, *NPDES Permit Writers Manual*, http://www.epa.gov/npdes/pubs/pwm_2010.pdf. And opportunities abound for litigation about the propriety of a permit and compliance once it is issued.

Regulators and businesses already face a significant backlog of permit renewals. NPDES permits must be renewed at least every five years. As of December 2009, only 80% of major and 84% of minor facilities held current permits. See http://www.epa.gov/npdes/pubs/grade.pdf; www.epa.gov/npdes/pubs/grade_minor.pdf. Every year, thousands of facilities must go through the renewal process, and new facilities must be permitted. Adding a new permit requirement for ditches and culverts on millions of miles of forest roads will overwhelm the NPDES program at a time of tightening constraints on agency spending and challenging economic times for forest owners and producers.

Contrary to the Ninth Circuit's suggestion, general permits offer no solution. General permits still impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. See EPA Office of Water, *General Permit Program Guidance* 4 (1988). Establishing a general permit through rulemaking often takes years, to determine that the point sources are substantially similar and require similar effluent limitations and monitoring. And general permits are themselves targets of administrative and judicial challenge: the propriety of virtually every new general permit is litigated. See, *e.g.*, *Waterkeeper Alliance* v. *EPA*, 399 F.3d 486, 498-506 (2d Cir. 2005) (sustaining challenges to general permit for concentrated animal feeding operations); Jeffrey M. Jaba, *Generally Illegal: NPDES General*

Permits Under the Clean Water Act, 31 HARV. ENVT'L L. REV. 409, 461 & n.254 (2007) (identifying "growing numbers of citizen suits").

Under these circumstances, the legal uncertainty from the Circuits' conflicting holdings and the Ninth Circuit's upending of longstanding EPA regulations is intolerable. It is exacerbated by CWA's substantial criminal and civil penalties. Violations of the CWA carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). And the citizen suit mechanism ensures endless civil suits to require NPDES permits and extract civil penalties. *Id.* § 1365(a). See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F.Supp.2d 41 (N.D.N.Y. 2003) (citizen suit resulting in $5.7 million penalty).

2. The Ninth Circuit's decision unsettles the balance of environmental responsibilities between the States and the federal government. Relying on EPA's consistent position defining forest road runoff as a nonpoint source to be regulated by the States, States have long-established silvicultural regulations and BMPs that protect the Nation's waters. Like Oregon, many control channeling of forest road runoff.[4] Congress understood that channeling would be part of state nonpoint source regulation. See S. Rep. 99-50 (S. 1128), at 35-36 (May 14, 1985), reprinted in 2 Leg. Hist. of Water Quality Act of 1987, 1420, 1456 ("best management practices" to "reduc[e] runoff" from "silvicultural areas" would include "careful road

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[4] *E.g.*, Schilling, *Compendium of Forestry Best Management Practices*, *supra*, at 15-16 (Southeastern States), 48 (Alaska), 76 (Utah), 83-84 (Washington)

placement, culverting, [and] grassing of abandoned roads").

The Ninth Circuit's ruling eviscerates the foundation for nonpoint source regulations by the States and undermines their viability. As such, it improperly "alters the federal-state framework" by commanding "encroachment upon a traditional state power." *SWANCC* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001); see 33 U.S.C. § 1251(b); *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality opinion).

3. The Ninth Circuit's ruling is poor environmental policy. EPA has explained that stormwater runoff from forest roads is best addressed through State regulations, not NPDES permitting. *E.g.*, 41 Fed. Reg. at 6282 (precipitation runoff "is more effectively controlled by the use of planning and management techniques"); 40 Fed. Reg. at 56932 ("most rainfall runoff is more properly regulated under Section 208," "whether or not the rainfall happens to collect before following into navigable waters"). The Ninth Circuit offered no reason to doubt the expert agency's long-held assessment.

The Ninth Circuit's ruling creates perverse incentives. It makes whether costly permitting is required turn on whether runoff is collected. Accordingly, states will "be deterred from using ditches and culverts to manage silvicultural runoff," which could "result in an increase in the amount of road sediment deposited into the waters of the state by runoff." Br. of State Defs., No. 07-35266, at 22. As the State defendants explained, "Congress did not intend to require NPDES permits for silvicultural runoff simply because" the BMPs used "happen to involve ditches and culverts." *Id.* at 18-20. Requiring NPDES per-

mits for these ditches and culverts would "subvert [the CWA's] regulatory scheme, and deplete the tools available to the states to manage water pollution." *Id.* at 27.

4. The Ninth Circuit's ruling conflicts with other Circuits' holdings, interprets EPA regulations in a manner EPA never intended, sows confusion over the regulation of hundreds of millions of acres of forests, and jeopardizes American jobs that depend on the forest products industry. It disrupts the settled division of responsibilities between the federal government and States and is environmentally counterproductive. And it subverts Congress's design regarding the procedures to be followed to challenge an EPA rule. By rejecting en banc review, the Ninth Circuit showed it will not reconsider its holding. No further percolation is necessary, or tolerable as a practical matter given the vast reach of the Ninth Circuit's ruling over American forests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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